mating that it would have been good if made direct: *Smith* v. *Smith*, 7 C. & P. 401. And "sufficient if it appear that the donor intended an actual gift at the time, and evidenced such intention by some act, which may fairly be construed into a delivery:" *Davis* v. *Ex'rs Davis*, 1 Nott & McCord 225; as where the donor "*said* he had given the property to his daughter, he must be understood to have done it with all the solemnities necessary to constitute a gift; and the subsequent possession with his consent was sufficient evidence of delivery:" *Brashears* v. *Blassingame*, 1 Nott & McC. 223. "By delivery is not meant actual manual delivery, but any circumstance showing a clear demonstration of the intention to transfer and of the other to accept, and which puts it into his power or gives him authority to take possession, is all that is necessary: *Reid* v. *Colcock*, 1 Nott & McCord 592. In neither of these cases was there an actual delivery; the circumstances and the declarations of the donor, constituted the gifts whereby "the jury were authorized to infer from them every thing that was necessary to the consummation of a legal gift, including necessarily the intention to give, the act of giving, the delivery and the consent to accept:" *Reid* v. *Colcock*, *supra*. As where the jury found that the following words: "I beg you to recollect I *have given* that horse to my son," constituted a gift without manual delivery: *Fowler* v. *Stuart*, 1 McCord 504; and where the words, "Ellen, recollect that one-half of that property belongs to your brother Ephraim," was held to vest one-half in the brother: *Jones* v. *McKee*, 3 Pa. St. 496; although this was a case of trust, yet the principle is the same.

In Maine this doctrine is limited, holding that while a valid gift of a note or chose in action may be made *inter vivos* or *causa mortis*, without endorsement or other writing, yet such a delivery as the subject is capable of must be made, as where the thing, at the time of the gift, was in the possession of the donee, and his ownership subsequently recognised by the donor: *Wing* v. *Merchant*, 57 Me. 386, following *Grover* v. *Grover*, 24 Pick. 261; *Borneman* v. *Sidlinger*, 15 Me. 429; and distinguishing *Shower* v. *Pilck*, 4 Exch. 478; *Dale* v. *Lincoln*, 31 Me. 422; *Allen* v. *Polereczky*, 31 Me. 338.

JNO. F. KELLY.

Washington, D. C.

Louisville Law and Equity Court.

ARNOTT v. WATHEN MASON MANUFACTURING CO.

Where a contract of hiring is made for a time certain at monthly wages, and the servant is tortiously discharged before the expiration of the period of hiring, he cannot immediately recover the entire amount of wages under the contract, both earned and unearned, but he may recover the wages earned, and such recovery will not estop him from bringing an action, after the expiration of the period of hiring, to recover the wages he was prevented from earning under the contract.

DEMURRER to the petition.

The petition alleged that the defendant, by a written contract filed as an exhibit, agreed to pay the plaintiff $75 a month for the space of one year, from October 10th, 1885, in consideration of

which the plaintiff agreed to work for the defendant as foreman in its broom factory for the same space of time; that after the plaintiff had entered upon the fulfilment of said contract, to wit, on the 3d day of February 1886, the defendant, without legal cause discharged the plaintiff from its service. That the plaintiff was ready and willing to perform his part of the contract. That the plaintiff afterwards brought suit against the defendant for his wages due up to that time under said contract, and on the 10th day of March 1886, obtained judgment against the defendant for his wages due on said contract up to that date. That, after the said 10th of March and before the expiration of the year covered by said contract, the plaintiff sought work and earned $147, which he was willing to allow as a credit upon the sum of $525, claimed as due him for the balance of the one year after March 10th, 1886, under the contract sued on.

This present suit was instituted on the 4th of April 1887, for the balance of the salary accruing during the balance of said period after March 10th, 1886.

The defendant demurred generally to the petition.

TONEY, J. (after stating the facts).—The demurrer is filed upon the theory that the contract for a year's service (wages payable monthly) is an entire indivisible contract, and that the suit and judgment on it (March 10th, 1886), before the expiration of the year, is a bar to any subsequent suit on the same contract for subsequently accruing wages under it. That in the suit and judgment of March 10th, 1886, the plaintiff could have recovered not only the wages due to him monthly up to that time, but also the wages to become due monthly for the rest of the period covered by the contract, and that whether the recovery of March 10th, 1886, embraced plaintiff's prospective wages for the balance of the year or not is immaterial, as the demurrant contends that said recovery was for the breach of the contract and should have covered prospective as well as accrued wages, and it is therefore a bar to any subsequent action for subsequently accruing wages under the same contract.

The court does not think that the case of *Powell* v. *Miller*, 10 B. Mon. 186–7, sustains the contention of demurrant; for it will be observed that at the time of the institution of the two suits mentioned in that case, under the agreement in reference to the boatload of coal, the money on both items, both the coal which the

defendant had kept for himself, and for the coal he had sold to other parties, was past due to the plaintiff, and a cause of action for the money covered by both items had accrued to the plaintiff; and rightly enough, it seems to me, the Court of Appeals held that both items entered as elements into but one cause of action, which could not be split up into two suits. And so in *Miller* v. *Corest*, 1 Wend. 487, cited for defendant, the entire price of the hay was due and owing at the institution of the suit for only a part of it. The case of *Staples* v. *Goodrich*, 21 Barb. 317, is also relied on by defendant. It does not seem to me to be authority for the position assumed by the defendant in this case. Nor is *Phillips* v. *Serick*, 16 Johns. 136, as may be seen from the language of SPENCER, J.

Secor v. *Sturgis*, 16 Johns. 554, also cited by the defendant, supports the same doctrine, that a judgment concludes the rights of the parties in respect to a cause of action stated in the pleadings on which it was rendered when the suit embraces the whole or only a part of the demand constituting the cause of action. It is plain to be seen that in all this line of cases there was an entire existing demand, whether in tort or in contract; an existing cause of action for a past due indebtedness when in contract, and for a past committed wrong when in tort, which the courts held cannot be divided up into separate grounds for a corresponding multiplicity of suits. *Nemo debet bis vexari pro eadem causa.*

The case of *Arteburn* v. *The L. & N. Rd. Co.*, appealed from this court, does not, it seems to me, sustain the proposition contended for by demurrant. That was an action in tort against the railroad company for damages for the destruction of a wagon. The plaintiff had before that suit recovered a judgment against the railroad in another action for the value of four mules killed at the same time by the same collision that destroyed the wagon. The same act of negligence caused the destruction of the mules and wagon at the same time. It was no more competent for the plaintiff to bring one action for the destruction of the wagon, and one for the destruction of the mules, than it would have been for him to bring a separate suit for damages for the loss of each mule, and one for the wagon, and one for each article or commodity that was in the wagon and happened to be injured or destroyed. In this case as in the other cases relied on in defendant's brief, reviewed in this opinion, a cause of action had accrued; the indebtedness as a whole was past

due and not yet to become due in the actions ex contractu, and the tortious act or wrong causing the injury had been committed in the actions ex delicto, and the decisions are uniform in holding, as we have seen, that in all such cases, it is not competent for the plaintiff to multiply suits and vex the defendants more than once on account of one existing cause of action. The soundness of the doctrine upon which all these cases rest, no one will question. The doctrine is elementary and too well established to require the citation of authorities. But these cases bear no analogy to the case at bar. What is the case presented by the pleadings in the case at bar?

The petition presents a case where wages are payable under a written contract at stated periods for a given length of time, and the employee or servant is tortiously discharged by his employer during the currency of said period. The question is can he recover his whole wages, that is, unearned wages, until after the time at which by the contract they would have accrued? If he may, then a recovery by him at any intermediate time before the expiration of the period for which he was employed, will bar a subsequent action for wages accruing under the contract subsequent to such recovery. If such contracts are entireties, and indivisible, there is great show of reason as well as authority for holding that such a recovery would operate as a bar to such subsequent action. But I hold that such contracts are not entireties, because it is well settled that in such a contract of hiring for a stated period, if the servant is discharged for a sufficient cause, he still may recover on a *quantum meruit* for the services actually rendered. This was held in *Jones* v. *Jones*, 2 Swan. (Tenn.) 605. The same doctrine was enforced in South Carolina in *Eakin* v. *Harrison*, 4 McCord 249; in Maine, in *Lawrence* v. *Gullion*, 38 Me. 532; and in Iowa, in *Byerlee* v. *Mendell*, 39 Iowa 382. In all such contracts it is believed it will be found that the law will not allow the technical doctrine of entirety to defeat the more equitable doctrine of apportionment.

Philpott v. *Evans*, 5 M. & W. 475, was an action before the day of delivery against a purchaser for refusing to receive corn. Baron PARKE said: "The plaintiffs were bound to wait until the time arrived for delivery of the corn, to see whether the defendant then would receive it." I do not mean to say that there are no instances under which a party could not maintain an action for a

breach of contract before the day or time, when under the contract the act was to be done; for instance, if a man promise to marry a woman on a future day and before that day arrives marries another, he is instantly liable to an action for breach of promise of marriage. This was decided in *Short* v. *Stone*, 8 Q. B. 358.

And so if a man contract to execute a lease on a future day for a certain term, and before that day arrives make a lease to another party for the same term, the cause of action at once accrues for said breach: *Ford* v. *Tiley*, 6 B. & C. 325.

And so if a man contract to sell and deliver specific goods on a future day, and before that day sell and deliver them to another, he is immediately liable on his first contract: *Bowdell* v. *Parsons*, 10 East 359.

In all these cases it will be observed that the contracts are essentially entireties, and that the defendant has, before the day, rendered it impossible for him to perform the contract at the period named in it. He disables himself by his antecedent acts from performing his contract at the day named, and that amounts to an immediate breach. In such a case, the defendant, from the nature of things, has no *locus pœnitentiæ*, and the performance of the contract according to its terms is made an impossibility. Can the same be said of the defendant in the case at bar, in regard to the wages which under the contract were payable monthly to the plaintiff after the 10th of March 1886?

In the case of *Frost* v. *Knight*, Law Rep., 5 Exch. 326, Chief Baron KELLY announced, as I think, the true doctrine in such cases. He quite overturned the decisions of *Hockster* v. *De La Tour*, 20 E. L. & E. R., which seems to be, up to the decision of *Frost* v. *Knight*, the leading English authority for the contention of the defendant.

Referring to the decisions upon which Lord CAMPBELL rested his opinion in that case, he said: "These cases are no authority at all for the proposition that a declaration by the defendant that he will not perform his promise amounts in itself to a present breach of the promise, upon which an action might be at once maintained."

And referring to the case of *Emmons* v. *Ellerton*, 4 H. of L. Cas. 624, also cited by Lord CAMPBELL, Chief Baron KELLY, continuing, said: "After dealing with these cases, the judgment, as livered by Lord CAMPBELL, will be found, when carefully con-

sidered, to amount to no more than an argument upon the reasonableness of affording some remedy to the plaintiff, where by reason of the declaration of the defendant that he would not take him into his service when the 1st of June should arrive, he was obliged either to remain unemployed until the 1st of June and lose the opportunity of obtaining another engagement, or to accept any other engagement that might be offered him, and so disentitle himself to maintain an action on the ground that he could not aver that he was ready and willing to perform his part of the agreement."

And further: "If one contracts to do an act on a future day, and before the day arrives declares to the other party to the contract that he will not perform his promise, the contract is not broken. It is not a breach at all; it is a promissory or prospective breach only, a possible breach which may never occur, and not an actual breach."

To say that the contract is broken is simply to utter an untruth. One contracts in 1870 to pay another 1000*l.* on the 1st day of June 1871. To say that the contract is broken before the year 1870 is at an end, is undeniably and self-evidently untrue. Applied to the case at bar, is it not equally clear and uncontrovertible that the promise of the defendant to pay $75 per month to the plaintiff in the months following March 1886, was not broken until the respective times for payment arrive.

Take for instance the wages due to the plaintiff under the contract in the month of April 1886. Can it be said that the defendant broke his contract to pay the April salary before the month of April arrived? In other words, can a party be guilty of a breach of contract to pay money at a certain fixed period or named day, before the day arrives? A refusal to pay money before it is due, is not a breach of either an express or implied contract. In order to constitute a breach of contract, I think the refusal to pay must be made on the day the money is due and not before. There may be an expression beforehand of an intention to break one's contract, but may not a wiser counsel prevail, and a change of mind take place before the day arrives? A *locus pœnitentiæ*, an opportunity to change one's mind, must always be indulged in order that repentance may bear its legal fruits.

The petition in this case is for the money which the defendant agreed and promised to pay plaintiff in the months of April, May,

June, &c., up to the 10th of October 1886. He sues for his wages —the specific monthly sums agreed to be paid for his services. The suit was brought on the contract, which for and during the whole year from October 10th, 1885, to October 10th, 1886, is a subsisting contract between them. And I hold under this contract, the wages must be due and payable before any action for them could be lawfully commenced and maintained. But when due, and by the terms of the contract they become due every month, an action accrued to the plaintiff for the amount so becoming due.

Under this contract the plaintiff could have brought the suit at the end of every month, or at the end of three, five, or any other number of months, the wages being expressly made payable monthly: *Lord* v. *Belknap*, 1 Cush. 279.

In *Badger* v. *Titcomb*, 15 Pick. 409, it was held that a contract to do several things at several different times was a divisible contract, and that the agreement might be entire, but the performance was several, and that assumpsit lies for every breach or default in the performance.

In the case of *Cunningham* v. *Morrill*, 10 Johns. 202, KENT, C. J., after reviewing all of the authorities, fully sustained this doctrine, overruling *Sears* v. *Fowler*, and *Hayden* v. *Bush*, in 2 Johns.

To the same effect is *Davis* v. *Preston*, 6 Ala. 83.

In *Tow* v. *Marsteller*, 2 Cran. 114, C. J. MARSHALL said that a contract for the payment of distinct sums of money at different periods is very much in the nature of distinct contracts.

An action of debt lies for each sum as it becomes due, and when that sum is paid the debtor or contractor is forever discharged from the contract to pay it.

Fowler v. *Armour*, 24 Ala. 194, was a contract to serve for one year at a stipulated sum payable monthly; the servant was discharged without fault on his part, before the expiration of the year. It was held that the servant might treat the contract as still subsisting, and sue in assumpsit for wages due according to its terms, or he might consider it rescinded and sue for unliquidated damages for its breach; that if he sued on the contract (as the petition in this case shows that the plaintiff's recovery was had in March), he can only recover the wages due by its terms before the institution of the suit.

In *Jones* v. *Dunton*, 7 Ill. App. Cases, it was held that a con-

tract to serve a year at a fixed sum payable in regular weekly instalments is divisible as to the remedy, and that the stipulations as to payment are several obligations.

In *Huntington* v. *The Ogdensburg & Lake Champlain Rd. Co.*, this whole doctrine was reviewed. That was a case in which Huntington, the plaintiff, had been employed by the railroad company as station agent for ten months from March 1st, 1866, at $100 per month. On the 7th of June of that year he was discharged without cause. In the month of July, just one month after his discharge, he brought suit against the company and recovered judgment for his salary up to the time of bringing the suit, to wit, $100, one month's salary. The second suit and the one decided in the Supreme Court of that state was brought after the expiration of the year for his wages under his contract from the time of his former recovery in July to the 1st of September, the end of the ten months of his employment. Said JAMES, J., in that case: "The single question is, was the former judgment rendered for wages for the month of June under the contract, a bar to a further recovery in another suit for his after-accruing wages under the same contract? It is settled law, "that only one action can be maintained for the breach of an entire contract, and that a judgment obtained by the plaintiff in one suit may be pleaded in bar of any second proceeding; but the difficulty is to determine in what cases the contract is entire, and the question becomes much complicated in the consideration of agreement to do specific acts at various prospective periods. * * * What, then, was the contract in this case? It was a hiring at $100 per month. It was, therefore, a contract containing several stipulations, each stipulation giving a right of action on its breach. There is no doubt the plaintiff could have maintained a separate action for each monthly instalment as it became due, had he not been discharged, but continued to serve. Having been discharged without cause, his rights were not lessened. He was not bound to treat the contract as at an end. * * * He had the right to treat the contract as still subsisting, and could maintain an action for each instalment as it fell due. I therefore hold that the former recovery is no bar to this action, and direct judgment for the plaintiff on the verdict."

Can any one discover any difference between that case and the one at bar? This doctrine was well recognised in *Greenleaf* v. *Kellogg*, 2 Mass. 568; *Cooley* v. *Rose*, Id. 221; and in *Andover Sav-*

ings Bank v. *Adams*, 1 Allen 28, in which cases it was held that a recovery may be had for the interest falling due on a promissory note, without being a bar to another and subsequent action for the principal. And in the same state (Massachusetts) it was held that an acceptance of an order to pay $200 out of the first money of the drawer received by the drawee from certain claims binds the acceptor to pay on request from time to time as the money is received, and that a judgment recovered against him (the acceptor) for part of the sum, on his refusal to pay, is not a bar to another and subsequent action against him for a further sum subsequently received by him: *Perry* v. *Harrington*, 2 Metc. (Mass.) 368.

In *Sterner* v. *Gower*, 3 W. & S. 136, it was held that a recovery for certain instalments falling due under a contract would not bar a subsequent action for subsequent instalments subsequently falling due under the same contract. To the same effect is *Logan* v. *Caffrey*, 6 Casey 200. It seems to me, therefore, that the doctrine is well settled both upon principle and authority that where a person is employed (as the plaintiff in the case at bar was) for a definite term at wages payable monthly, the monthly instalments may be at once sued for as they become due; and that the wrongful discharge of the employee or servant will not impair his remedial rights to compensation under the violated contract for constructive service: *Armfield* v. *Nash*, 31 Miss. 361; *Thompson* v. *Wood*, 1 Hilt. 93; *Gordon* v. *Brewster*, 7 Wis. 355, and *Boogs* v. *The Pacific Rd. Co.*, 33 Mo. 212.

In *Isaacs* v. *Davis*, 12 Ga. 556, it was held, after a full discussion and review of the authorities, that if a servant is employed for five months at a specified rate per month, and pending the employment is wrongfully discharged, he may at his option sue at the end of each month for the monthly instalment falling due under the contract, or wait until the end of the term of employment, and sue in *indebitatus assumpsit* for all the instalments with interest thereon. And as far back as *Goodman* v. *Pocock*, 15 Adol. & E. (N. S.) 580, PATTESON, J., after reviewing the case of *Cutter* v. *Powell*, and the annotations thereon in 2 Sm. L. Cas., p. 20, said the result of the authorities on this subject seemed to be, that a clerk, servant or agent wrongfully dismissed during his term of service, has his election of three remedies, viz.:

1st. He may bring a special action for his master's breach of

contract in dismissing him, and the remedy he may pursue immediately.

2d. He may wait till the termination of the period for which he was hired, and may then sue for his whole wages, in *indebitatus assumpsit*, relying on the doctrine of constructive service.

3d. He may treat the contract as rescinded, and sue immediately on a *quantum meruit* for work he actually performed. The learned judge expresses himself with some doubt and hesitation as to the second of the above propositions, about which, with becoming diffidence, it seems to me there is no substantial ground for doubt, in view of the unbroken current of authorities in its support. The divisibility of the remedial rights of the plaintiff under the contract sued on in this case is fully sustained by the Court of Appeals of Kentucky, in *Keith's Ex'rs* v. *Hinkston*, 9 Bush 283. LINDSAY, J., in delivering the opinion of the court, held that a contract which bound the obligor to keep a switch or spur in good repair, and to furnish cars and transport the stock, products and commodities of the plaintiff, Hinkston, to market, was a divisible contract, and would admit of an indefinite number of actions for a continued breach of its said stipulations.

In that case the learned judge said: "The breach of the undertaking is charged to be the removal of the switch and the refusal by the appellants (the defendants in the court below) to make any provision for the transportation of appellee's stock, commodities, &c. It is evident," said he, "that the damages sustained, if any, result not from the removal of the switch, but from the failure to replace it at proper times to accommodate Hinkston in the shipment to market of his stock, &c. The failure of appellants to keep this agreement up to the trial of this action does not entitle Hinkston to recover for like failures for all time to come."

This seems to be an authority directly in point from our own Court of Appeals. Nor is there anything inconsistent with the doctrine laid down by Judge LINDSAY in that case in his subsequent decision in the case of *The Elizabethtown & Paducah Rd. Co.* v. *Pattinger*, 10 Bush 188; nor in the opinion of ROBERTSON, J., in the case of *Chamberlain* v. *McCallister*, 6 Dana 360.

The breach of the terms and stipulations of the contract by the defendant for which the plaintiff obtained a recovery in March 1886, did not, I hold, rescind the contract nor extinguish the contractural right of the plaintiff under it; and the plaintiff had the

right to consider it a subsisting contract until the end of the term of service. To allow the defendant to extinguish the contract by his own breach of its terms so as to defeat the plaintiff's rights thereunder, would be to allow him to profit by his own wrong. It was the duty of the plaintiff to seek other employment of like character, and to credit his earnings, if he made any, to the defendant on his contract liability. He had no right to sit by and hold his hands without any exertion until the end of the term. Such idleness would in itself have been a breach of moral obligation, and a fraud which the law would rather punish than reward. The plaintiff did seek and obtain other employment, and in his petition has allowed the defendant the proper legal credit in that behalf. He is guilty of no delinquency as far as this record shows. The facts stated in this petition, I hold, constitute a cause of action. Let the demurrer be overruled.

ABSTRACTS OF RECENT DECISIONS.

SUPREME COURT OF THE UNITED STATES.[1]
SUPREME COURT OF ALABAMA.[2]
SUPREME COURT OF CALIFORNIA.[3]
SUPREME COURT OF GEORGIA.[4]
SUPREME COURT OF ILLINOIS.[5]
SUPREME COURT OF KANSAS.[6]
SUPREME JUDICIAL COURT OF MAINE.[7]
COURT OF APPEALS OF MARYLAND.[8]
SUPREME COURT OF MONTANA.[9]
COURT OF CHANCERY OF NEW JERSEY.[10]
COURT OF ERRORS AND APPEALS OF NEW JERSEY.[11]
COURT OF APPEALS OF NEW YORK.[12]
SUPREME COURT OF OHIO.[13]
SUPREME COURT OF SOUTH CAROLINA.[14]
SUPREME COURT OF VERMONT.[15]
SUPREME COURT OF APPEALS OF WEST VIRGINIA.[16]

ASSIGNMENT. See *Taxes*.

ATTORNEY AND CLIENT.

Authority of Attorney—Claim by Third Party.—Where attorneys had a claim of their client for collection, and accepted in payment or

[1] To appear in 122 U. S. Rep.
[2] To appear in 80 or 81 Ala. Rep.
[3] To appear in 70 or 71 Cal. Rep.
[4] To appear in 76 or 77 Ga. Rep.
[5] To appear in 120 or 121 Ill. Rep.
[6] To appear in 36 or 37 Kan. Rep.
[7] To appear in 79 or 80 Me. Rep.
[8] To appear in 67 or 68 Md. Rep.
[9] To appear in 7 or 8 Mont. Rep.
[10] To appear in 42 or 43 N. J. Eq. Rep.
[11] " " "
[12] To appear in 105 or 106 N. Y. Rep.
[13] To appear in 45 or 46 Ohio Rep.
[14] To appear in 25 or 26 S. C. Rep.
[15] To appear in 59 or 60 Vt. Rep.
[16] To appear in 29 or 30 W. Va. Rep.